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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT,

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT,
THE UNITED STATES OF AMERICA, INTERVENOR.

EXCEPTIONS OF THE STATE OF COLORADO, IMPLEADED DEFENDANT, TO THE REPORT, THE FINDINGS OF FACT, THE CONCLUSIONS OF LAW, AND THE RECOMMENDATIONS OF THE SPECIAL MASTER.

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State Capitol,
Denver 2, Colorado.

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IN THE

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OCTOBER TERM, 1944

No. 6 Original

THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT,

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT,
THE UNITED STATES OF AMERICA, INTERVENOR.

EXCEPTIONS OF THE STATE OF COLORADO, IMPLEADED DEFENDANT, TO THE REPORT, THE FINDINGS OF FACT, THE CONCLUSIONS OF LAW, AND THE RECOMMENDATIONS OF THE SPECIAL MASTER.

The State of Colorado, impleaded defendant above named, by Gail L. Ireland, Esq., its Attorney General, who acts in its behalf at the request and by the direction of the Honorable John C. Vivian, its Governor, excepts and objects to the report, the findings of fact, the conclusions of law and the recommendations of the Special Master, as follows:

I.

Colorado excepts and objects to the conclusion and recommendation of the Master (pp. 8-11, 177-180*) that

*All page numbers refer to pages in the Master's Report.

an apportionment of the water supply of the North Platte River and its tributaries, except the Laramie River, should be made as between the State of Colorado and the States of Wyoming and Nebraska.

As grounds for this exception and objection, Colorado says:

(a) Any apportionment of the waters of an interstate stream requires the placing of a limitation or restriction on the upper state (Colorado) and hence amounts to an impairment of the quasi-sovereignty of that state to the extent of such restriction or limitation.

(b) No decree will be entered against a state (Colorado) upon the suit of another state (Wyoming and Nebraska) unless there is a showing by clear and convincing evidence that the state which claims to be aggrieved (Wyoming and Nebraska) has suffered an injury of serious magnitude.

(c) There is no showing, and the Master does not find, that Colorado has injured or presently threatens to injure either Wyoming or Nebraska or any water user in any down stream area.

(d) No decree will be entered against a state upon proof merely of potential threat of injury. The only showing made against Colorado is a threat of future injury which may possibly result from increased use. Such increased use is characterized by Wyoming in its Answer to the Colorado Cross-Bill (Par. 15) as "never advanced beyond the speculative state," and by Nebraska in its Answer to the Colorado Cross-Bill (Par. 15) as "inchoate" and "not progressed beyond the paper stage." The Master (p. 130) finds that there is no "immediate" threat of increased Colorado use.

(e) There is no showing that either Wyoming or Nebraska has utilized, or does now utilize, fully and properly the water supply of the North Platte River

which in the past has been, and now is, available to them and their water users. The existence of an unused surplus supply of water is shown by the fact that during the pendency of this case the Kendrick Project for the irrigation of 60,000 acres has been constructed in Wyoming (p. 35), and the Sutherland and Tri-County Projects for the irrigation of over 200,000 acres have been constructed in Nebraska (p. 36), and by the fact that there have been and now are large unconsumed outflows from the irrigated portion of the basin.

(f) The recommendation of the Master can only be sustained upon the erroneous principle that an original interstate suit, involving water uses on an interstate stream between states all of which apply the appropriation as opposed to the riparian doctrine of water law, constitutes an exception to the rule that this Court will not restrain the action of a state upon the suit of another state unless an existing or presently threatened injury of serious magnitude is established by clear and convincing evidence. The conclusion of the Master (pp. 107, 110, 112) results from a misinterpretation of *Wyoming v. Colorado,* 259 U. S. 419, and is contrary to *Colorado v. Kansas,* 320 U. S. 383.

(g) The recommendation of the Master, if adopted by the Court, would, since there is no showing of existing or presently threatened injury by Colorado, constitute the entry of a declaratory judgment in violation of Section 2, Article III of the Constitution of the United States.

(h) The recommendations of the Master, if adopted by the Court, would deprive Colorado of the equality of right and power to which it is entitled as a member state of the Union as its jurisdiction over the use of water within its borders would be limited and restricted even though such uses do not injure water users in any other state.

II.

Colorado excepts and objects to the failure of the Master to recommend that the motions of Colorado for dismissal (p. 99) should be granted and that no relief should be awarded the other parties as against Colorado.

As grounds for this exception and objection, Colorado says:

(a) The evidence is insufficient to sustain any judgment against Colorado.

(b) Wyoming has neither pleaded nor introduced any evidence that existing uses in Colorado injure Wyoming and its water users. Wyoming has pleaded a potential threat of injury by Colorado alleged to result from the possibility of increased trans-mountain diversions in Colorado but the Master finds (p. 130) that, whatever threat there may be of an increased Colorado use, "it can hardly be said to be immediate."

(c) Nebraska has neither pleaded nor proved any existing or presently threatened injury resulting from Colorado water uses and the Master specifically finds (p. 105) that there is no clear evidence that Nebraska "has suffered injury of great magnitude in the broad sense of serious damage to her agriculture or industries or observable adverse effects upon her general economy, prosperity or population."

(d) The Master finds that the irrigated acreage in Wyoming and Nebraska has increased uniformly in much greater proportion than in Colorado in the period 1910-1939 (see Table on p. 29) and that since the inception of the suit projects have been constructed in Wyoming and Nebraska fo the irrigation of greatly increased acreage while the irrigated acreage in Colorado has remained static (see Table and footnote 1 on p. 37).

III.

Colorado excepts and objects to the recommendation of the Master as contained in paragraph numbered 1 on page 177 of his report whereby the Master recommends the entry of a decree:

> "1. Enjoining Colorado (a) from the diversion of water for the irrigation in North Park of more than 135,000 acres of land, (b) from the accumulation in storage facilities in North Park of more than 17,000 acre feet of water between October 1 of any year and September 30 of the following year, and (c) from the transbasin diversion out of North Park of more than 6,000 acre feet of water between October 1 of any year and September 30 of the following year."

As grounds for this exception and objection, Colorado says:

(a) The recommendation of the Master is in conflict with his findings that:

(1) Existing Colorado uses are within Colorado's equitable apportionment (pp. 9, 128);

(2) There is no immediate threat of any injury by an expansion of Colorado uses (p. 130);

(3) Nebraska has suffered no injury to her agriculture, industries, general economy, prosperity, or population (p. 100).

(b) The recommendation of the Master is made upon the assumption that an apportionment should now be determined upon the basis of the drouth conditions which have assertedly existed since 1930 (pp. 10, 39, 67-68, 119-123, 130, 132). This is inequitable because:

(1) A limitation placed upon Colorado and the upstream areas of Wyoming upon the basis of drouth conditions will result in the waste of water as it is found by the Master (Table III, pp.

67-68) that the supply in the down-stream Whalen-Tri-State Dam Section was adequate in the drouth period, and accordingly in years of normal or above normal supply the water will not be needed down stream and at the same time cannot be used upstream because of the recommended limitation.

(2) Equity between the various river sections requires that any decree limiting or defining rights should be based upon average usable water supply with due regard to storage possibilities and not upon conditions existing during a drouth period.

(3) An assumption that an abnormal drouth condition will continue has no justifiable basis whatsoever.

(4) The recommendation places the entire burden of water shortages caused by lack of precipitation upon the upper basin whereas equity requires that such shortages should be borne by all river sections and not imposed unproportionately on any one section. The only protection against such water shortage is reservoir construction and the Master denies to Colorado the right to construct additional reservoirs.

(5) The effect of the recommendation is to allocate the surplus water supply available under normal conditions to the lower North Platte Basin, for future use and development, since upstream expansion is prohibited and no limitation is placed upon downstream development.

(6) The recommendation of the Master ignores the facts that the construction of Pathfinder Reservoir in the period (1904-1909)resulted in profound changes in the regimen of the stream (pp. 32-33) and that during the pendency of this suit Seminoe Reservoir with a capacity comparable to that of Pathfinder was constructed (p. 35)

and will have an effect on stream flows which is as yet unascertainable.

(c) The definition of apportionment to Colorado is improper and unfair as it is based upon average conditions existing during a drouth period and upon the hypothesis that such drouth conditions will continue. Hence, it is not an equitable apportionment which fairly and adequately protects the existing economic development in the Colorado portion of the North Platte Basin.

(d) The effect of the recommenda ion of the Master is to disturb the relationship between Colorado water users. Such relationship is dependent upon state law and the holders of the rights under state law are not parties to this case. In an interstate suit involving the equitable apportionment of the waters of an interstate stream, this Court determines the gross right of the state and state law, then operates to determine the distribution between the water users in the state.

IV.

Without conceding that any limitation should be placed upon water uses in Colorado and without in any way waiving exceptions and objections Nos. I, II, and III above, Colorado excepts and objects to the failure of the Master to recognize and give effect to the Act of August 9, 1937, (50 Stat. Pt. 1, Chap. 570, p. 595) which reads in part thus:

"Provided, That in recognition of the respective rights of both the States of Colorado and Wyoming to the amicable use of the waters of the North Platte River, neither the construction, maintenance, nor operation of said (Kendrick) project shall ever interfere with the present vested rights or the fullest use hereafter for all beneficial purposes of the waters of said stream or any of its tributaries within the drainage basin thereof in Jackson County, in the State of Colorado, and the Secretary of the Interior is hereby au-

thorized and directed to reserve the power by contract to enforce such provisions at all times."

As grounds for this exception and objection, Colorado says:

(a) The recommendation of the Master is that Colorado be enjoined from making water uses in excess of the amounts stated in paragraph numbered 1 on page 177 of his report.

(b) The recommendations of the Master permit the operation of the Kendrick project, i. e., the storage of water in Seminoe and Alcova reservoirs and the diversion of direct flow water by the Casper canal, in accordance with the priorities of those reservoirs and that canal in relation to the North Platte Project and the so-called State Line Canals;

(c) The recommendations of the Master by unqualifiedly limiting Colorado uses and expressly permitting use of water upon the Kendrick Project violate the quoted provision of the Act of August 9, 1937.

V.

Colorado excepts and objects to the recommendation of the Master (p. 179):

"10. Permitting any of the parties to apply at the foot of the decree for its amendment or for further relief, and retaining jurisdiction of the suit for the purpose of any order, direction or modification of the decree or any supplementary decree that may at any time be deemed proper in relation to the subject matter in controversy."

As grounds for this exception and objection, Colorado says:

(a) The purpose of this recommendation is to carry into effect the conclusion of the Master (p. 122) that the Court should retain jurisdiction to amend the decree if and when "important changes of condition"

have occurred and will by both its letter and spirit require this Court to exercise administrative functions.

(b) The exercise of administrative control over the stream is utterly incompatible with the judicial function and is contrary to the jurisdiction and powers of this Court as defined by Constitution and by statute.

(c) No worthwhile definition of the rights of the states to an equitable apportionment of the benefits arising from the flow of the stream can be made on any other than a permanent basis without forever jeopardizing the stability of all water use projects, both those now existing and those which may be developed in the future.

(d) The effect of the recommendation is to shift the burden of proof by requiring upper states to prove the negative and establish no injury to lower states whereas the recognized principle is that an injury of serious magnitude must be positively shown by clear and convincing evidence before the action of a state may be restrained.

Respectfully submitted,

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Denver, Colorado
November 10, 1944